No. 2761.

United States Circuit Court of Appeals

For the Ninth Circuit.

ROD D. LEGGAT,

Appellant,

vs.

CHARLES D. McLURE,

Appellee.

BRIEF OF APPELLANT.

Filed

NOLAN & DONOVAN,

Solicitors for Appellant.

Oates & Roberts Printers, Butte

United States Circuit Court of Appeals

For the Ninth Circuit.

ROD D. LEGGAT,
Appellant,

vs.

CHARLES D. McLURE,
Appellee.

NO. 2761.

BRIEF OF APPELLANT.

NOLAN & DONOVAN,
Solicitors for Appellant.

STATEMENT OF THE CASE.

This action was brought on the equity side of the District Court of Montana, on April 7, 1915, by appellee against appellant, to compel the conveyance of real property to appellee, which property was purchased at execution sale by appellant. The gist of the bill is stated in paragraph eight (T. 4-6.) Mining properties of the appellee, worth approximately one hundred thousand dollars, were offered for sale under an execution at Butte, Silver Bow County, Montana, on June 6, 1913, upon a

judgment in favor of Wight & Pew against appellee, where they were bid in by appellant for $1004.15. On that date appellee alleges that the appellant agreed to bid an amount equal to the judgment, principal and costs, and to hold the property as a mortgage; and that he further agreed, before the period of redemption had expired, namely one year, that he "would hold any title" that he might obtain as a mortgage. Appellee sought to redeem upon payment of the amount bid at the execution sale, less a loan of five hundred dollars made by appellee to appellant. All the material allegations of the bill were denied by the answer (t. 14) and supplemental answer (t. 23). The district court found for the appellee and directed that upon payment of the sum bid, the appellant should convey all of the property belonging to the appellee on the date of the execution sale. From this decree the appeal has been taken.

The principal question arising in the case is: If the title acquired by Leggat on June 6, 1913, was, at the time he acquired it, the title of an ordinary purchaser at execution sale not affected by any trust, did Leggat become a trustee and a mere mortgagee because of his conduct during the period of redemption, which induced McLure to believe that he might affect a redemption after the period of redemption had expired? Did appellee sustain the burden of proof imposed on him in seeking to establish the trust alleged?

ASSIGNMENT OF ERRORS RELIED ON BY APPELLANT. (T. 31, 32, 33.)

7. The court erred in finding that the defendant agreed with the complainant that he would bid an amount equal to the judgment as to principal, interest and accruing costs and

expenses of sale when the sheriff should offer the said real property above described for sale under the execution issued in Wight et al. vs. complainant.

10. The court erred in finding that the defendant informed complainant repeatedly that after the period of one year from the date of the said execution sale might expire, provided there was no redemption, defendant would hold any title that might be obtained by reason of the expiration of time merely as a mortgage to secure the repayment from the complainant of the sum bid at the execution sale by defendant and interest thereon at the rate of eight per cent per annum.

13. The Court erred in finding that, had complainant sought bidders, complainant's interest in any one of the four parcels of land described in plaintiff's bill of complaint would have brought the amount of the said judgment of Ira T. Wight et al. versus complainant.

15. The Court erred in concluding that the plaintiff was entitled to recover of and from the defendant the interest in the mining claims set out in the complaint and claimed by him.

18. The Court erred in concluding that where the purchaser at sheriff's sale leads the judgment debtor to believe he can redeem after the statutory time runs and thus causes him to fail to redeem before the statute runs, the purchaser waives the time and the debtor can redeem within a reasonable time after the statute runs.

BRIEF OF ARGUMENT.

The rule relating to the burden of proof, as well as the weight and sufficiency of evidence, is the same in actions to

establish a trust as in other civil cases. The burden rests upon the party seeking to establish and enforce a trust to show clearly all the facts upon which his cause of action is founded, and the evidence must be clear, full and satisfactory, and of such a character as to disclose the exact rights and relations of the parties and take the matter out of the realm of conjecture or presumption; and where the evidence is capable of reasonable explanation on a theory other than the existence of a trust, no trust will be held established.

13 En. Ev. 160.
39 Cyc. 84.
16 Cyc. 926, 932.

"But it is plain that the principle which turns a cotenant into a trustee who buys for himself a hostile outstanding title can have no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in any wise the result of collusion nor subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public."

Starkweather vs. Jenner, 210 U. S. 524, 17 A. & E. Anno. Cas. 1167.

Of course the burden of proof would immediately shift if it were shown that the defendant occupied towards the plaintiff a relation that forbade him to acquire the property of the plaintiff. If, for instance, the money that he paid the sheriff was the money of the plaintiff, or if he were the agent of plaintiff, or his guardian, or attorney. The result of all the cases where a trust is presumed is this: That where it is shown that a person has without right the property of another, the

law presumes that it was received for the latter and is held for his use.

If the appellee has any right against appellant it arose on June 6, 1913.

The allegations in the bill, paragraph 8 (not sustained), that McLure requested Leggat to become a purchaser because he was without funds, and that he attended the sale with the defendant, are explained in a reasonable fashion, but it seems to us that his case, both in allegation and in proof, is not so clear, convincing and satisfactory as to remove his claim from the realm of conjecture and doubt. A few days before in St. Louis, he alleges a state of facts (t. 186, 187) not to be reconciled with the present bill. Some of these inconsistencies, such as the request for an accounting, have been explained, appellee setting forth that Leggat had told him that he had sold the properties, but no explanation has been offered concerning the origin of his right of action against the appellee as set forth in the St. Louis action. He sets up that the sale to Wolvin & Hayes of the Bland, Ouichita and Eastern claims, was carried on by Leggat, and that thereafter the sale was abandoned by the prospective purchasers. He then avers:

"Plaintiff further states that at the request of the said defendant, and in furtherance of resummation of said negotiations then being conducted by plaintiff and defendant for the sale of said mining properties and the interest of the parties hereto, respectively, the full title to the interest of this plaintiff in and to said properties was placed in the name of said defendant, so that upon completion of negotiations for the sale thereof the title thereto might be quickly and effectively passed to the prospective purchasers thereof, with whom said defendant and this plaintiff were negotiating for the sale of the same.

"Plaintiff further states that at the time of placing the title to the interest of this plaintiff in the name of said defendant as aforesaid, this plaintiff had full confidence in the integrity of the said defendant and in his assurances and promises that the interest of this plaintiff in said property would be held by the defendant for the plaintiff and fully accounted for to the plaintiff on any sale thereof by the defendant, if and when this plaintiff requested sale and disposition" and so forth.

The present case, both in allegation and proof, refutes most emphatically that McLure placed the title to the properties in Leggat "at the request of the said defendant and in furtherance of resummation of ..... negotiations ..... for the sale ....." Here he alleges that he sent Leggat to the sale to purchase the property for him and to hold it as a mortgage for the security of the amount bid at the sale, to be held by the defendant "as security" for the payment of the said sum of $1004.15 with interest at the legal rate from June 8, 1913, until such time as he desired to take up the loan. There is nothing about a resumption of negotiations for a sale of the properties, nothing about an agreement to convey to such person as he might designate upon a sale.

Again, the bill alleges, paragraph 8, "that the defendant informed your orator repeatedly that after the period of one year might expire, provided there was no redemption, he would hold any title that might be obtained by reason of the expiration of time merely as a mortgage" and so forth. No explanation was offered upon the hearing as to these inconsistencies.

It appears from his own testimony that he went to the office of the sheriff about half past seven or eight o'clock in the morning with the object of saving the expense of a sheriff's sale (t. 147, 148).

"Q. When the properties involved in the complaint . . . were advertised for sale, what did you do on the morning of the sale?

"A. On the morning of the sale, I think the sale was at about nine o'clock; I got up early in the morning and got my breakfast and went up to the sheriff's office, and I got there about eight o'clock, or I believe half an hour or a quarter of an hour before eight o'clock, and the deputy or clerk was there, and I asked them if I could come and pay off the judgment and stop the sale—in other words I wanted to save any expense of sheriff's sale, and he replied to me that the property had been advertised for sale and would have to be sold, and I asked him then what time it would be sold and he said at ten o'clock. I then asked him if he would take my check if I would bid on the property, and he said that it would have to be a certified check. 'Well,' I says, 'you can telephone to the bank and see whether the check is good,' and he replied then, he says, 'Mr. Wight will be here at the sale and if he will take your check it will be all right,' and my reply was that Mr. Wight had sued me and I would not ask him to take my check; so I came up and went to the hotel, which was at least a few minutes before nine o'clock, and I telephoned to Mr. Leggat and told him what had past, and as Mr. Leggat was an owner in the Eastern claim, which was in my name, or rather I held it, and I told him they had refused my check and I says 'Come over,' and he says, 'All right, I will be right over' and he came over . . ."

Is it not a reasonable inference that these circumstances would have been so clearly and indelibly fixed upon the memory of Mr. McLure on April 5, 1915, when he filed his bill in St. Louis, that he would not have alleged that he voluntarily

place the title to his properties in the name of Mr. Leggat in anticipation of a resumption of negotiations for their sale? Is not the testimony quoted above so wholly inconsistent with his St. Louis complaint that there is no common ground between them?

The alleged agreement upon which he now stands is contained in the continuation of the last answer and is as follows (t. 148):

"And I was sitting in the hotel waiting for him to come and I saw him coming across the street and before he had crossed the street I went over and stopped him and I says Mr. Leggat, the sale is to be at ten o'clock, and I says they refused by check, and he says, they will take my check, and I says, will you come up and bid it in, and he says, yes, and I says, I will give you a check when we come down, and he says, all right, I will go up and attend to it, and he went up to the sale, and I suppose it was about a quarter after ten, or half past ten, anyway between ten and eleven o'clock, and he came down to the hotel and he told me that he had bid the property in, and he said that Mr. Murray was there, I think he said James A. Murray, but I am not sure, but I know he said Murray was there, and he said some of the Hennessy's and they were going to bid the property in, and he went in and told them that it was our joint property, and said that by his own influence he had persuaded them not to bid against him, so he told them their account would be all right and that he would bid it in, and he did bid it in, and I says, Rod, if you want a check for this I will give you my check for it, and he says never mind that."

Is it likely that Mr. McLure, when he filed his bill in St. Louis, he having acquired no different information in the mean-

time concerning the transaction at the sale, having been told that Mr. Leggat had even gone to the extent of informing other creditors of Mr. McLure that they would receive their account if they permitted Mr. Leggat to bid it in, having permitted Mr. Leggat to pay for the property, and having allowed Mr. Leggat to decline reimbursement—is it likely that he would have interpreted these transactions as establishing the relation between himself and Leggat that he alleges in the St. Louis bill?

Messrs. Lynch and Noonan, the two clerks and deputy sheriffs who testified, have no interest in the transaction (t. 199, 204). They have no recollection of seeing Mr. McLure on the day of the sale. Mr. Lynch conducted the sale and remembers very clearly the sale itself (t. 199, 204). We submit that under the rule imposed upon him in this case that it was his duty to have produced the person to whom he made the application to be permitted to pay the judgment, and we have a right to presume that his failure to produce such person and testimony, independent of his own recollection of the matter, is because he has found upon reflection that as to this point he is mistaken.

Neither can it be urged here that the transaction upon which he seeks to recover here is consistent with the St. Louis bill. He is quite positive here about the transactions on June 6, 1913, but very uncertain concerning any portion of the evidence that even remotely tends to uphold the interpretation of his rights as set forth in the St. Louis bill.

The testimony of Mr. Murray and of Captain Sanders is not inconsistent with the position of the appellant. It is true that Mr. Leggat had handled the sale of the Eastern claim for T. Stewart White and the appellee. It is undisputed, however,

that all preliminary negotiations concerning the price and terms were submitted to Mr. McLure before their final adoption evidenced by a formal agreement. So far as the testimony shows any agency, it is not proof of an agency such as the law attaches a trust to as to a judicial sale, because here defendant was acting in carrying on the preliminary negotiations not with reference to the judicial sale. During the period of one year after June 6, 1913, Mr. McLure had the right to repurchase. Mr. Murray testifies as to a conversation that occurred during this period, or during the period covering one year after the sale. It also appears from the testimony that in 1912 Mr. Leggat had purchased the same property on execution sale in the suit of John Clayberg against appellee, and that the appellee had redeemed by a direct payment to the sheriff without consulting or notifying Mr. Leggat (t. 209).

There is no conflict here as to the relation that was established between the parties in the Elvina. Their agreement was that McLure should put up his money for the purchase and development, against the appellant's time and labor in procuring the property and supervising its development. Whatever relation appellee seeks to establish by operation of law has no application in the face of this agreement. The weight of authority is entirely contrary to the proposition that one tenant in common, who buys the common property at a judicial sale, purchases for the benefit of all tenants in common. This is only true in a limited sense. That is where the purchasing tenant in common purchases an obligation against the common property on which he is personally or jointly liable, as for instance the purchase of a tax title would be held to inure in the hands of a cotenant to the benefit of his cotenants.

The rule as stated in 7 R. C. L., page 860, is as follows:

"On the sale of the common property for the satisfaction of a debt to pay which rests upon one tenant in common alone, his cotenant may purchase the interest in the same manner as a stranger might do so. But it is also true that where a cotenant acquires title from a sale under a deed of trust made by all the cotenants, for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot, under his rights so derived, hold the land against his cotenants. It is obvious that if a cotenant causes the common property to be sold under a deed of trust or a mortgage or other lien, for the purpose of purchasing, for his own benefit, the outstanding title thus created, he is guilty of a breach of trust which precludes him from taking advantage of such title as against the other cotenants. Likewise, one tenant in common, in the sole or joint possession of lands, cannot acquire a tax title issued for taxes accruing during his possession, and assert it to cut off his cotenants, whether the cotenancy exists under the same or different instruments. Since it is his duty to pay the taxes, he cannot take advantage of his own dereliction or neglect."

Starkweather vs. Jenner et al., supra.

He may purchase the common property at a judicial sale or sale under power.

Starkweather vs. Jenner et al., supra.

See note to this case, 17 A. & E. Anno. Cas. pp. 1169 and 1172, where it is stated that

"The rule appears to be well settled that one tenant in common may purchase the interest of his cotenant upon a sale for the satisfaction of a debt, the duty to pay which rests upon

such tenant alone, in the same manner that a stranger might do so."

Britton vs. Handy, 20 Ark. 381, 73 Am. Dec. 497.
Gunther vs. Latham, 7 Cal. 588.

Apart from the decisions cited, the appellee is not in a position to urge, under his view of the case, that any trust has been established by appellant's purchase of the Elvina. There was no secrecy about the sale. Plaintiff says he knew of it, and under his view it was done under his direction.

Gross inadequacy of price alone unaccompanied by fraud cannot be held to avoid a judicial sale.

A sale will not be set aside because of the gross inadequacy of the sum paid to the value of the property.

Burton vs. Kipp, 30 Mont. 275; 76 Pac. 563.

"A gross inadequacy of price is competent, so far as it goes, to establish fraud; but it is not in itself, in the absence of other circumstances tending to show fraudulent behavior on the part of the sheriff or the plaintiff in the writ, enough to warrant the presumption that the sale was fraudulent."

Again the appellee is not in a position to urge this point because it affirmatively appears that he knew that the property was purchased for the amount of the judgment, interest and costs, and under his view of this case, it was purchased for $1100 under his direction. He should not be heard to assert anything to the contrary at this late date.

As to the construction of the statute as to the manner of conducting sales of property on execution, the question is disposed of in Burton vs. Kipp, supra, where sales en masse

are upheld. The provision of the Montana statute is that in "sales of real property consisting of several known lots or parcels, they must be sold separately."

Sec. 6830, Revised Codes, 1907.

The judgment debtor has the right to be present and direct the order in which the parcels shall be sold. The certificate of sale here shows that the lots or parcels were offered separately, and that there were no bidders for them. This fact does not appear in Burton vs. Kipp.

"So far as the pleadings show the property may actually have been offered in different lots and sold in gross only after it was found that there were no bidders for the different parcels. In such case the sale may be in gross for the creditor is not to be foreclosed of his effort to collect his debt by the mere want of bidders for the different parcels. Here again the provision for redemption affords protection for the debtor, and in the absence of a specific allegation of circumstances tending to show that plaintiff was prevented from availing herself of this protection, she should not be heard to complain."

Here the appellee is not in a position to complain because he had an opportunity to direct the manner of sale by the sheriff and has known, or should have known, since June 6, 1913, that his property was sold in gross.

IF THE TITLE ACQUIRED BY LEGGAT ON JUNE 6, 1913, WAS, AT THE TIME HE ACQUIRED IT, THE TITLE OF AN ORDINARY PURCHASER AT EXECUTION SALE, NOT AFFECTED BY ANY TRUST, PLAINTIFF'S EVIDENCE OF STATEMENTS MADE BY DEFENDANT DURING THE PERIOD OF RE-

DEMPTION IS, EVEN IF TRUE, ENTIRELY INSUFFICIENT TO CREATE A TRUST IN THE PROPERTY IN QUESTION OR TO REDUCE THE DEFENDANT'S INTEREST TO THAT OF A MERE MORTGAGEE.—Authorities can be found which sustain the position that if by the representations, conduct and promises of the purchaser at the execution sale, during the period of redemption, the judgment debtor is lulled into a false security and thereby permits the period of redemption to elapse, the purchaser will be declared to be a trustee.

20 Cyc. 232.

These authorities, however, have no application to the case at bar, because they rest upon the proposition that a purchaser at execution sale does not at such sale and before the period of redemption expires, acquire the full title of the judgment debtor, but acquires only an equitable estate (17 Cyc. 1290), or simply an inchoate or conditional right to an estate liable to be defeated any time within one year by the payment of the purchase money and interest.

Curtis vs. Millard and Co. 14 Iowa 128, 81 Am. Dec. 460.

And, therefore, if by his fraud, the purchaser induces the judgment debtor to permit the period of redemption to elapse and thereby procures the full legal title to the estate, he has gained a thing by fraud and is, upon well settled principles of equity as well as by express provisions of the statutes of this state, an involuntary trustee of the thing so gained.

Section 5373, Revised Codes of Montana: "One who gains a thing by fraud . . . . undue influence, the violation of a trust, or other wrongful act, is, unless he has some other

or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

39 Cyc. 172.

Pomeroy Eq. Juris. Sec. 1044.

But under the law of Montana, the defendant herein acquired, by virtue of his purchase at the execution sale, on June 6, 1913, the full legal and equitable title of McLure to the real estate in question.

Section 6836, Revised Codes of Montana: "Upon a sale of real property, the purchaser is substituted to and acquires the right, title and interest, and claim of the judgment debtor thereto . . . . ."

McQueeny vs. Toomey, 36 Mont. 282; 92 Pac. 561.

McLure retained only a bare right to repurchase.

McQueeny vs. Toomey, supra.

And this right was not real estate nor an interest in real estate.

McQueeny vs. Toomey, supra.

Nothing, therefore, passed to Leggat by reason of the expiration of the period of redemption or the issuance of the sheriff's deed; and, if during the period of redemption, he made the promise testified to by the plaintiff herein, since he acquired no *property* by reason thereof, there is nothing to which any trust can attach. The sheriff's deed issued to Leggat on the 11th day of June, 1914, performed no function other than to certify that there had been no redemption. It did not transfer any title because the title had passed on June 6, 1913.

McQueeny vs. Toomey, supra.

The title so acquired by Leggat could have been revested in McLure by a redemption within one year.

Section 6838, Revised Codes of Montana: "The judgment debtor . . . . may redeem the property from the purchaser any time within one year after the same . . . ."

But, aside from the methods of redemption prescribed by the statute, it could not be transferred or impaired otherwise than by an instrument in writing.

Section 4612, Revised Codes of Montana: "An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or by his agent thereunto authorized by writing."

Section 5091, Revised Codes of Montana: "No agreement for the sale of real property, or of any interest therein, is valid unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged . . . ."

Section 7969, Revised Codes of Montana: "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged . . . ; evidence, therefore, of the agreement, cannot be received within the writing or secondary evidence of its contents:

. . . . . .

"5. An agreement for the . . . . sale of real property, or of an interest therein . . . ."

A bare oral promise by Leggat to convey to McLure the real

estate, the full, legal and equitable title of which was then vested in him, falls plainly within the statute of frauds and is void.

Secs. 5091 and 7969, Revised Codes of Montana.

Nor can the interest of Leggat in the properties so acquired be reduced to that of a mere mortgagee by evidence of oral promises, because this would involve a transfer of the *title* back to McLure, since a mortgagee does not hold the *title* to the property mortgaged.

Swain vs. McMillan, 30 Mont. 439; 76 Pac. 945.

And a transfer of real estate cannot be accomplished by parole.

See sections above cited.

We therefore respectfully submit that the evidence given by the plaintiff of promises and representations and conduct on the part of Leggat, between June 6, 1913, and June 6, 1914, even if they were all found to be true, would not raise a trust in favor of McLure nor reduce the interest of Leggat in the property to that of a mere mortgagee.

Respectfully submitted,

NOLAN & DONOVAN,
Solicitors for Defendant.